

benjamin and desportes

April 29, 2013

Bevill M. Dean, Clerk
Richmond Circuit Court – Criminal Division
John Marshall Courts Building
400 N. 9th Street
Richmond, VA 23219
BY COURIER

Re: *Commonwealth v. Todd Schneider*
Case Nos. CR13F-1960 thru 1963
Motion to Dismiss

Dear Mr. Dean:

Enclosed please find a Motion to Dismiss which I would appreciate your filing with the papers in the referenced matter and bringing to the attention of Judge Spencer.

This matter is scheduled for a hearing on May 2, 2013 at 2:00 pm.

Sincerely yours,

Steven D. Benjamin

cc: Patrick W. Dorgan, Esquire
Office of the Attorney General

Benjamin and DesPortes, Attorneys

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA

v.

Case No. CR13F-1960 thru 1963

Trial date: July 15-16, 2013 at 9:30 a.m.

TODD SCHNEIDER

MOTION TO DISMISS INDICTMENTS

The defendant, by counsel, moves this Honorable Court to dismiss the indictments against him pursuant to the authority of Va. Code 19.2-265.6 on the grounds that the indictments were obtained in violation of the defendant's due process rights to an impartial prosecutor under Article I, Section 11 of the Constitution of Virginia and the Fourteenth Amendment of the United States Constitution. In support of this motion, the defendant states as follows:

The Commonwealth's Motion to Recuse Mandates Dismissal

1. On April 26, 2013, Attorney General Ken Cuccinelli moved to withdraw from the prosecution of the captioned matter, a prosecution that he had commenced by direct indictment on March 20, 2013.
2. As grounds for this motion, he stated that he and his office had a conflict of interest because Mary Shea Sutherland, a former state employee at the Executive Mansion, had left the Mansion in October, 2011, to work for a firm that participated in fundraising efforts in support of the Attorney General's on-going campaign to be Governor of Virginia.
3. The Attorney General stated that "this ground alone is sufficient to warrant the Court granting the Commonwealth's motion to recuse the Office of the Attorney General from the prosecution." (Commonwealth's *Brief in Support of Motion to Recuse* at footnote 1)

4. As the legal basis for his motion to withdraw from the prosecution, the Attorney General cited holdings of the Virginia Supreme Court and Court of Appeals that recognize the constitutional rights under the Virginia and United States Constitutions of criminal defendants to protection from prosecutors “who are partial to interests beyond their official duties.” Lux v. Commonwealth, 24 Va. App. 561, 568-569, 484 S.E.2d 145, 149 (1997).
5. The Attorney General is correct that a defendant has a right to an impartial prosecutor. Virginia appellate courts have recognized that prosecuting attorneys have broad discretion within the criminal process, including “whether or not to prosecute an individual,” and that the breadth of this discretion “carries with it the potential for individual and institutional abuse.” Lux, 24 Va. App. at 568, 484 S.E.2d at 148.
6. The Attorney General is not correct, however, that his withdrawal or recusal is the appropriate remedy in this case.
7. On May 21, 2012, Patrick Dorgan, Senior Assistant Attorney General, and agents with the FBI and the Virginia State Police interviewed Mary Shea Sutherland. In that interview, Ms. Sutherland provided information material to this case. She also made it known during that interview “that the company she is working for is helping with fund-raising efforts for Ken Cuccinelli’s Gubernatorial campaign.” (The source for this quote, an FBI Investigation Report, will be made available for the Court’s *in camera* review upon request.)
8. Because Ms. Sutherland’s employment by the Attorney General’s fund-raising firm was known to the Attorney General and the Commonwealth by at least May 22, 2012, *nine months before the March 20, 2013, indictments*, the indictments must be dismissed.

9. The Sutherland conflict of interest existed for the Attorney General when he was deciding whether to prosecute Todd Schneider. The decision to prosecute by a prosecutor with an interest “such that his objectivity and impartiality are called into question” (Commonwealth’s *Brief in Support of Motion to Recuse* at paragraph 14, quoting Nicholas v. Sammons, 363 S.E.2d 516, 518 (W.Va. 1987)), was a violation of due process under the Virginia and United States Constitutions.
10. Moreover, as additional grounds for its motion, the Commonwealth states that because the defense will present evidence through information and testimony provided by “members of the Governor’s administration and its staff as witnesses in his defense, the Office of the Attorney General, as counsel for the Governor’s administration, could be placed in the untenable position of having to cross-examine individuals who work for our client....and creates a potential conflict of interest for the Office of the Attorney General in its prosecution of this case.” (Commonwealth’s *Brief in Support of Motion to Recuse* at paragraph 11)¹
11. The Commonwealth knew as early as February, 2012, and well before seeking indictments against Todd Schneider on March 20, 2013, that members of the Governor’s administration and its staff, including Ms. Sutherland, would be witnesses to instances of Todd Schneider having been told to take food for unpaid catering invoices or as reimbursement for food, services, or other items he provided. The Commonwealth also knew, as early as February, 2012, and well before seeking indictments against Todd

¹ This position suggests that the Attorney General will seek to challenge the testimony and impeach the credibility of state employees on the Governor’s staff who will give testimony favorable to Schneider, regardless of the accuracy of that testimony. This position suggests an improper bias inconsistent with a prosecutorial duty to do justice. See Young v. United States, 481 U.S. 787, 803 (1987).

Schneider, that these and other state employees were witnesses to other people openly taking cases of food and other supplies from the Governor's Mansion under no claim of right as objectively reasonable as Todd Schneider's.

12. Current and former Governor's Mansion employees possess information that is probative of both Todd Schneider's innocence and of a practice and willingness at the Governor's Mansion to use Mansion accounts and state funds to provide food and supplies for purposes for which the issuance of state checks had been refused, and for which direct payment would not have been authorized.
13. If the status of these employees as witnesses presents a conflict of interest for the Attorney General and his office, that conflict of interest was known as early as February 10, 2012, and well before the prosecutorial decision to indict Todd Schneider.
14. The indictments must be dismissed because these conflicts existed at the time of the Attorney General's decision to prosecute - for the same reasons that the Sutherland conflict mandates dismissal.

Additional Grounds for Dismissal

At the time he was deciding whether to indict Todd Schneider in March, 2013, the Attorney General had conflicting personal, financial, and political interests more substantial and pervasive than the conflicts he now concedes require him to withdraw. Most of those conflicts existed for the Attorney General more than a year prior to his decision to indict. The relevant facts are as follows:

15. On February 10, 2012, agents with the Virginia State Police and the Federal Bureau of Investigation interviewed Todd Schneider at his residence. Mr. Schneider, then the Chef at the Executive Mansion, was cooperative and answered all of their questions.

16. On February 17, 2012, Mr. Schneider's attorney, Steven D. Benjamin, talked with Patrick W. Dorgan, Senior Assistant Attorney General and Chief of the Special Prosecutions and Organized Crime Section of the Office of the Attorney General. Mr. Dorgan advised Mr. Benjamin of his office's interest in statements made by Mr. Schneider indicating that he had information of wrongdoing by the Governor and First Lady.
17. On March 2, 2012, Mr. Benjamin and Mr. Dorgan spoke further, and on March 5, 2012, at Mr. Dorgan's request, Mr. Benjamin and Mr. Schneider agreed to meet on March 8, 2012, with Mr. Dorgan and agents from the FBI and the Virginia State Police at the Office of the Attorney General.
18. On March 8, 2012, Mr. Schneider and Mr. Benjamin met with Mr. Dorgan and the agents. At that meeting, Todd Schneider provided evidence of "wrongdoing" and "abuse," as those terms are defined by Va. Code §2.2-3010. Because these disclosures were made to the Attorney General, "an appropriate authority" as defined by Va. Code §2.2-3010, Todd Schneider became a "whistle blower" under state law, as defined by Va. Code §2.2-3010.
19. The information that he provided included information concerning Jonnie Williams (the CEO of Star Scientific, Inc.) and Maureen McDonnell (the First Lady of Virginia). He described Williams' efforts to ingratiate himself within the Mansion with gifts Williams had provided the McDonnells, including payments for their daughter's wedding in the summer of June, 2011, a summer vacation in 2011, and the use of expensive cars and a private jet. Todd Schneider also discussed the McDonnells' promotion of Star Scientific products, including the introduction of Anatabloc (a food supplement) to MCV doctors at a lunch Todd Schneider cooked at the Mansion on August 30, 2012.

20. On March 21, 2012, the Virginia State Police asked Mr. Benjamin to provide copies of the documents evidencing the information Todd Schneider had provided, including the wedding catering contract signed by Robert McDonnell, the check from Jonnie Williams used to pay for the wedding catering, and the refund check to Maureen McDonnell of the overpayment for the wedding catering. These documents were provided to Patrick Dorgan and the Virginia State Police as requested.
21. At no time during the provision of this information concerning Jonnie Williams to the Attorney General's Office did Todd Schneider or his lawyer know that Jonnie Williams and Attorney General Ken Cuccinelli were friends or had a "friendly relationship." At no time prior to the March, 2012, meeting had Ken Cuccinelli disclosed his ownership of a substantial amount of Star Scientific stock, although that ownership was a required public-disclosure under Virginia law. *See* Va. Code §2.2-3114.
22. As stated above, Patrick Dorgan and agents with the FBI and the Virginia State Police interviewed Mary Shea Sutherland on May 21, 2012 and she notified them of her financial and political connections to Ken Cuccinelli and Jonnie Williams.
23. During the summer of 2012, Ken Cuccinelli spoke with Jonnies Williams and used Williams' vacation home at Smith Mountain Lake for free.
24. During the summer of 2012, Ken Cuccinelli also sold 1500 shares of stock in Star Scientific at \$4.70 per share, for a profit of \$7,000; and belatedly amended his January, 2012, financial disclosure form to show his 2011 ownership of Star Scientific stock worth in excess of \$10,000.
25. On January 15, 2013, the Attorney General filed the financial disclosure form required by Virginia law and publicly disclosed his continued ownership of Star Scientific stock, but

failed to disclose the use of Williams' Smith Mountain Lake vacation home during the preceding summer.

26. In January and February, 2013, the United States Attorney's Office for the Eastern District of Virginia served federal subpoenas on Star Scientific, its directors, and others. The service of these subpoenas would not be publicly disclosed by Star Scientific until its required filing of an annual report on March 18, 2013.
27. On March 20, 2013, the Office of the Attorney General indicted Todd Schneider.
28. In the weeks prior to indictment Todd Schneider's counsel had objected to the Office of the Attorney General that Ken Cuccinelli had a conflict of interest that prevented his making an impartial decision whether to prosecute Todd Schneider. Defense counsel objected that Ken Cuccinelli was influenced by his ownership of stock in Williams' company. Defense counsel objected that Todd Schneider was the whistleblower who reported the undisclosed gift of \$15,000 from Williams for the wedding and who provided documentary evidence to corroborate his statements.
29. Defense counsel had further objected that prosecuting the whistleblower without investigating Todd Schneider's information concerning the use of the Mansion by Williams, the promotion of Williams' food supplement by the Governor and the First Lady, and other matters indicated that the prosecutorial decision was influenced by the Attorney General's conflicting personal and financial interests.
30. Despite these objections, the Attorney General directed that Todd Schneider be indicted on March 20, 2013.
31. The Attorney General made the prosecutorial decision to indict Todd Schneider at a time when he had a conflict of interest created by his personal and financial relationship with

Jonnie Williams and Star Scientific and a political relationship with the Governor of Virginia.²

32. At the time that the Attorney General made this prosecutorial decision, his conflict of interest and inability to be impartial was even more substantial and pervasive than Todd Schneider or his counsel were aware, as evidenced by the following facts:
- a. Ken Cuccinelli's continued relationship and communication with Jonnie Williams during the summer of 2012;
 - b. Ken Cuccinelli's sale of 1500 shares of Star Scientific stock at the almost record price of \$4.70 per share, for a profit of \$7,000, during the summer of 2012;
 - c. Ken Cuccinelli's free use of Williams' vacation home at Smith Mountain Lake during the summer of 2012;
 - d. Ken Cuccinelli's failure to disclose in January, 2013, as required by law, Williams' gift of the use of his vacation home at Smith Mountain Lake during the summer of 2012;
 - e. Ken Cuccinelli's free use of Williams' vacation home at Smith Mountain Lake and a catered Thanksgiving dinner in 2010;
 - f. Ken Cuccinelli's failure to disclose in January of 2011, 2012, and 2013, as required by law, Williams' gift of the use of his vacation home and catered Thanksgiving dinner in 2010;
 - g. Ken Cuccinelli's gift of a \$628 flight to New York from Williams in 2009;
 - h. Ken Cuccinelli's failure to disclose, in January of 2010 and in all succeeding years, the \$628 gift;

² In December 2012, Governor Robert McDonnell endorsed Ken Cuccinelli's bid to be the next Governor of Virginia.

- i. Williams' gift to 5 members of the Attorney General's Office of free lodging at Williams' 2.5 million dollar home on 26 acres in Henrico County.
33. On March 25, 2013, a class action lawsuit against Star Scientific, Jonnie Williams, and others was filed in the United States District Court for the Eastern District of Virginia, Richmond Division. The lawsuit alleges that Star Scientific, Williams, and others "engaged in a plan, scheme, conspiracy and course of conduct, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices and course of business which operated as a fraud and deceit....and employed devices, schemes and artifices to defraud in connection with the purchase and sale of securities." The lawsuit further alleges facts consistent with the federal crimes of mail, wire, and securities fraud.
34. Ken Cucinnelli's personal and financial involvement with Williams and Star Scientific and his political involvement and endorsement by the Governor of Virginia conflicted with his duty to investigate information provided by Todd Schneider to determine whether Williams used the Mansion and his relationship with the Governor and First Lady to promote a scheme to defraud; and it created an incentive to prosecute Todd Schneider to compromise him and his credibility as a potential witness in any civil or criminal proceeding that might result against Jonnie Williams or the McDonnells.
35. Ken Cucinnelli's personal and financial involvement with Jonnie Williams and Star Scientific and his political involvement and endorsement by the Governor of Virginia conflicted with his duties under Va. Code §2.2-3126 (A)(1) to "investigate matters that come to his attention reflecting possible violations of the provisions of ...[the Va. State and Local Government Conflict of Interests Act] by officers and employees serving at the state level of government;" including his duty to investigate information provided by

Todd Schneider that the Governor had received a gift of \$15,000 from Jonnie Williams that he had failed to disclose; and, it created an incentive to prosecute Todd Schneider to compromise him and his credibility as a potential witness in any civil or criminal proceeding that might result from the federal investigation of Jonnie Williams.

36. The conflicts of interest alleged by the Attorney General in support of his motion for recusal and the conflicts of interest alleged in this motion for dismissal all existed at the time that the Attorney General made the decision to prosecute Todd Schneider in violation of Schneider's due process rights under the Virginia and United States Constitutions to have an impartial prosecutor make that decision.
37. Nevertheless, and over Todd Schneider's objection to the Attorney General that he was not impartial because of his conflicts of interest, the Attorney General indicted Todd Schneider on March 20, 2013.
38. This conduct is so egregious, the violation of Todd Schneider's due process rights is so complete, and the investigation of this matter so tainted by the continued involvement of the Office of the Attorney General for one year after the conflicts developed, that the only appropriate remedy is dismissal with prejudice pursuant to Va. Code §19.2-265.6

MEMORANDUM OF LAW

"The breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for individual and institutional abuse." Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); *see also* Lux v. Commonwealth, 24 Va. App. 561, 568, 484 S.E.2d 145, 148 (1997). Therefore, "we require impartiality in the exercise of discretion on the part of the prosecutor." Adkins v. Commonwealth, 26 Va. App. 14, 18, 492 S.E.2d 833, 834 (1997); *see also* Berger v. United States, 295 U.S. 78, 88 (1935). An accused has a constitutional right to the

involvement of an impartial prosecutor who can make unbiased choices from all of the options available. Young v. United States, 481 U.S. 787 (1987); *see also* Jones v. Richards, 776 F.2d 1244, 1246-47 (4th Cir. 1985). Prosecutors are public officials who must exclusively serve the public interest. Berger v. United States, 295 U.S. 78, 88 (1935). The injection of a personal interest, financial or otherwise, in the criminal enforcement process, may introduce irrelevant and impermissible factors into prosecutorial decisions and violate constitutional provisions. Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980); *see* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978). Where the prosecution has "some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question," the defendant's due process rights under the Virginia and United States Constitutions are violated. Lux, 24 Va. App. at 569, 484 S.E.2d at 149 (internal citations omitted); *see also* Cantrell v. Commonwealth, 229 Va. 387, 394, 329 S.E.2d 22, 26-27 (1985).

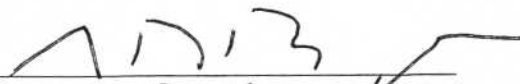
In this case, the prosecutorial decisions about charging and the value of cooperation against others were made by a prosecutor with financial, political, and personal interests affected by those decisions. At the time he made the decision to prosecute, the Attorney General had received financial gifts from Jonnie Williams, owned stock in Williams' company (Star Scientific), and was running for the Office of Governor – a campaign for which he needs substantial political donations and the support of the current Governor of Virginia. These personal, financial, and political interests would suffer greatly if Jonnie Williams and Star Scientific were investigated for improper political contributions or other illegal activity, including money laundering, tax evasion, and fraud. By failing to investigate others about whom Todd Schneider provided information and documentation concerning possible bribery, misuse of state funds, money laundering, and tax evasion, the Attorney General has not exercised impartial

prosecutorial discretion because such investigations would be contrary to his personal interests. In choosing to prosecute Todd Schneider and to attempt to obtain felony convictions which could be used in impeach his credibility in any subsequent federal or state prosecutions in which Todd Schneider may be a witness, the Attorney General acted in his own interests and did not exercise impartial prosecutorial discretion. The financial, political, and personal links between the prosecution and Jonnie Williams and the McDonnells "creates an intolerable danger that public interest will be compromised and produces at least the appearance of impropriety." Young v. United States, 481 U.S. 787 (1987).

The Attorney General's decision to indict Todd Schneider, a whistleblower under state law, even though defense counsel had already raised the issue of his having a conflict of interest demonstrates the bad faith of the Attorney General and requires the dismissal of the indictments with prejudice.

Respectfully Submitted,

TODD SCHNEIDER

By 
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CERTIFICATE

I certify that a true and exact copy of this Motion was mailed, first class postage prepaid, and sent by electronic mail this 29th day of April, 2013, to Patrick W. Dorgan, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219; PDorgan@oag.state.va.us.


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